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No. 85-186

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
Petitioner,

v.

KENNETH A. HEROLD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

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August 30, 1985

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully moves this Court for leave to file the attached Brief *Amicus Curiae*.[1] AAR has limited such requests to instances where issues of overriding concern to the railroad industry are involved and such requests have always been granted.[2] The Court has generally permitted the

[1] Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents withheld consent. The brief is timely filed under the Rules of the Supreme Court which require filing within the time allowed for the filing of the brief in opposition (Rule 36.1), which is 30 days after receipt of the petition by Respondent (Rule 22.1). The "return receipt" form indicates that Respondent received the petition on August 5, 1985.

[2] *See Burlington Northern Railroad Company v. Cosby*, No. 84-1313 (filed March 18, 1985); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982); *Kassel v. Consolidated Freightways Corp.*, 449 U.S. 897 (1980); *Raymond Motor*

participation of industry associations in cases such as this, which involve issues of special concern to the industry as a whole.[3]

AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States.[4] AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The decision of the Court of Appeals in this case will have a great impact on the ability of railroads to make decisions aimed at enhancing the safety of crew members, pedestrians and motorists. This is an area which has been of great concern to the AAR[5] as well as to individual

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Transportation, Inc. v. Rice, 434 U.S. 885 (1977); *Baltimore & Ohio Railway v. Jackson*, 354 U.S. 943 (1957); *Webb v. Illinois Central Railroad*, 353 U.S. 943 (1957).

[3] *See, e.g., Western Airlines v. California*, 53 U.S.L.W. 3484 (U.S. Jan. 7, 1985) (motion of Air Transport Association of America for leave to file brief amicus curiae granted); *Peick v. Pension Benefit Guaranty Corp.*, —— U.S. ——, 104 S. Ct. 1588 (1984) (American Trucking Associations).

[4] A listing of the membership of the Association appears at Appendix A to the attached brief.

[5] *See, e.g.*, Comments of Donald M. Tutko (on behalf of AAR) before the United States Department of Transportation, Federal Railroad Administration on Freight Car Safety Standards, Definition of Defective Wheels. FRA Docket No. RSFC-6, Notice No. 12 (1985); Comments of the AAR before the United States Department of Transportation, Federal Railroad Administration on Control of Alcohol and Drug Use in Railroad Operations. FRA Docket No. RSOR-6, Notice No. 4 (1984); Comments of the AAR before the United States Department of Transportation, Federal Railroad Administration on Proposed Requirement for Displaying of Alerting Lights by Locomotives at Public Grade Crossings. FRA Docket No. RSGC-2, Notice No. 3 (1982); Statement of A. W. Johnston (on behalf of the AAR) before the Federal Rail-

railroads. Because of its holding that non-required safety devices which have actually been removed from a locomotive fall within the requirements of the Boiler Inspection Act, this case will affect all railroads which have seen fit to equip their locomotives with safety features which are not required by federal regulation. The Eighth Circuit's opinion calls into question the legal liability of these railroads for removal of non-required safety equipment, as well as their ability to rely on FRA regulations in this area.

Because it represents the industry as a whole the AAR is in a position to convey the industry's concern with this decision and to present factual information which will underscore these concerns. The consequences of this decision will be felt by the entire railroad industry, not just the individual railroad involved in the litigation below. As an industry trade association, AAR can address more fully the potential impact of this case on the industry as a whole than can the parties. The AAR respectfully submits that its participation as *amicus curiae* will assist the Court in resolving this case by providing information which will make more clear the impact of the decision below on railroad safety.

Respectfully submitted,

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road Administration on Track Safety Standards: Miscellaneous Proposed Amendments, FRA Docket No. RST-3, Notice No. 3 (1982).

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE [1]

As the trade association for the nation's railroads, the Association of American Railroads ("AAR")[2] has a vital

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[1] Petitioner has consented to the filing of this brief pursuant to Rule 36 of the Supreme Court rules. Respondents withheld consent. A motion for leave to file this brief therefore accompanies the brief.

[2] AAR is a voluntary, unincorporated, nonprofit association of railroads operating in the United States, Canada and Mexico. Its member railroads employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of

interest in the interpretation and administration of federal legislation pertaining to railroad safety. The AAR has long been active in assisting in the formulation of industry views pertaining to railroad safety regulation and has participated extensively in Congressional hearings and administrative rulemaking proceedings to present the views of the industry regarding regulatory proposals affecting railroad safety.[3] The AAR has also participated on behalf of the industry in various court proceedings where the construction of federal safety legislation raise important issues of industry-wide concern.[4]

The decision below raises an important issue of great concern to the railroad industry. In its decision, the Eighth Circuit, in upholding a district court negligence award arising from a railroad grade crossing accident,

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the freight revenues of all railroads in the United States. A listing of the membership of the Association is attached as Appendix A to this brief. The Association represents its member railroads before courts, the U.S. Congress, government agencies and administrative tribunals when matters of common concern are at issue.

[3] *See, e.g.*, Comments of Donald M. Tutko (on behalf of AAR) before the United States Department of Transportation, Federal Railroad Administration on Freight Car Safety Standards, Definition of Defective Wheels. FRA Docket No. RSFC-6, Notice No. 12 (1985); Comments of the AAR before the United States Department of Transportation, Federal Railroad Administration on Control of Alcohol and Drug Use in Railroad Operations. FRA Docket No. RSOR-6, Notice No. 4 (1984); Comments of the AAR before the United States Department of Transportation, Federal Railroad Administration on Proposed Requirement for Displaying of Alerting Lights by Locomotives at Public Grade Crossings. FRA Docket No. RSGC-2, Notice No. 3 (1982); Statement of A. W. Johnston (on behalf of the AAR) before the Federal Railroad Administration on Track Safety Standards: Miscellaneous Proposed Amendments. FRA Docket No. RST-3, Notice No. 3 (1982).

[4] *See*, e.g., *Fort Worth & Denver Ry. Co. v. Lewis*, 693 F.2d 432 (5th Cir. 1982), *rehearing denied*, 707 F.2d 515 (1983); *United States v. St. Louis-San Francisco Ry. Co.*, 572 F.2d 1224 (8th Cir.), *cert. denied*, 439 U.S. 973 (1978) (AAR as amicus).

has construed the provisions of one of the principal federal safety statutes, the Boiler Inspection Act,[5] as permitting a finding of a statutory violation (and a finding of negligence) based upon a railroad's removal from a locomotive of a nonessential safety device that the railroad was not required under the Act to install in the first instance. The decision, which is unprecedented and in conflict with decisions of this Court and other federal courts construing the provisions of the Boiler Inspection Act, will create serious difficulties for the railroad industry if left unchecked.

Under the Boiler Inspection Act and other relevant federal statutes,[6] the Federal Railway Administration (FRA) is responsible for adopting and administering rules for the installation and proper maintenance of essential safety equipment on locomotives. These federal rules pertaining to essential locomotive equipment have been held by this Court to "occupy the field" and to fully preempt state laws purporting to require additional equipment.[7]

Many members of the railroad industry, in an effort to further enhance railroad safety and to gather data regarding the efficacy and cost-effectiveness of new safety devices, have voluntarily undertaken to install various non-essential safety devices on locomotives in addition to those federally required under the Boiler Inspection Act. These devices—none of which has yet been found effective by the Federal Railroad Administration (FRA) in reducing accidents—range from the relatively simple and inexpensive to the complex and costly.

Should the decision of the Eighth Circuit be allowed to stand and a railroad be held subject to violation of

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[5] 45 U.S.C. § 22 et seq. (1982).

[6] Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966).

[7] *Napier v. Atlantic Coast Line*, 272 U.S. 605, 613 (1926).

the Boiler Inspection Act (and to tort liability under state law) for the operation of a locomotive from which a non-required safety device has been removed, a great and wholly unwarranted disincentive would be placed upon the railroad industry with respect to voluntary railroad innovation regarding locomotive safety equipment. If a railroad were uncertain whether, and under what circumstances, it could remove (even temporarily) a non-required safety device from a locomotive without risk of financial penalty under the Boiler Inspection Act [8] or liability under state tort law, the railroad would be far less inclined to experiment with additional, but potentially ineffective or undependable, safety devices than if it could rely on federal safety regulations to define clearly its essential locomotive safety equipment obligations.

Moreover, because the decision below conflicts with decisions of this Court and those of other circuits with regard to the scope of the railroad industry's obligations under the Boiler Inspection Act, the uncertainty and lack of national uniformity fostered by the decision below provides strong additional grounds for industry-wide concern. The AAR, on behalf of the railroad industry, therefore strongly supports the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

In the decision below, the Eighth Circuit has found a railroad subject to violation of the Boiler Inspection Act (and subject to liability under state tort law) for the absence of an optional locomotive safety device (an amber rotating beacon) not required by FRA regulations. The optional device had been initially installed by the railroad as a voluntary safety measure in excess of FRA regulations and had been subsequently removed by the

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[8] Section 9 of the Boiler Inspection Act, as amended, 45 U.S.C. § 34 (1982), provides for penalties of up to $2,500 for each violation of the Act.

railroad after malfunction. The Court below reasoned that once voluntarily installed, the optional device became an "appurtenance" under the Act which the railroad was required to maintain upon the locomotive at all times in proper working condition.

The decision below is unprecedented, contrary to decisions of this Court and other courts, and will cause serious problems in the implementation of the Boiler Inspection Act. In no case has liability under the Boiler Inspection Act ever been premised upon the *absence* of a non-required safety device. Indeed, in its decision in *Southern Ry. Co. v. Lunsford*, 297 U.S. 398 (1936), this Court has squarely rejected the predicate for the decision below—the absolute notion that a carrier "creates its own standard of safety [under the Act] by the appliances which it places upon its locomotive." *Id.* at 402.

Moreover, the decision below wholly ignores the concern expressed by this Court in *Lunsford* that the purpose of the Boiler Inspection Act ("avoidance of unnecessary peril to life or limb") not be undercut by interpretations of the Act that would discourage voluntary safety efforts. By subjecting a railroad, otherwise in full compliance with the Boiler Inspection Act and all applicable FRA regulations, to financial penalties under the Act and state tort claims for the subsequent removal of an optional safety device once voluntarily installed, the decision below will create a serious disincentive to the voluntary use by the railroad industry of non-essential devices beyond those required by FRA. Because the decision below will seriously impede voluntary safety efforts under the Act, and will concomitantly undermine the preemptive effect of FRA essential equipment regulations in negligence actions under state law, the decision below merits review by this Court. Further, because the decision below conflicts with *Lunsford* and relevant cases in other circuits, the uncertainty and lack of national uniformity fostered by the decision below provides strong additional grounds for this Court's review.

I. THE COURT OF APPEALS HAS MISCONSTRUED THE BOILER INSPECTION ACT IN A MANNER THAT WILL DISCOURAGE RAILROAD USE OF OPTIONAL SAFETY EQUIPMENT

Pursuant to the Boiler Inspection Act of 1911, as amended,[9] Congress conferred upon the Interstate Commerce Commission ("Commission") the power to regulate railroad locomotives and their "appurtenances," including the authority to require railroads to install particular safety equipment on locomotives. See *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481 (1943); *Napier v. Atlantic Coast Line Railroad Company, supra.* The Boiler Inspection Act also imposed a duty upon railroads, enforceable by the Commission, to maintain the locomotive and its appurtenances in "proper condition and safe to operate in the service to which the same are put." 45 U.S.C. § 23 (1982).[10] The authority set forth in the Boiler Inspection Act was subsequently transferred to the Federal Railway Administration (FRA)[11] which, like its predecessor, has adopted extensive regulations with respect to specific requirements regarding locomotive safety equipment. 49 C.F.R. pt. 229 (1984). As this Court has specifically recognized, because of the extensive federal regulation of locomotive safety equipment, federal equipment requirements under the Boiler Inspection Act totally occupy the field and preempt state laws purporting to require additional equipment. *Napier v. Atlantic Coast Line*, 272 U.S. at 613.

The court below, in affirming a district court negligence judgment against the Burlington Northern Rail-

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[9] 45 U.S.C. §§ 22 et seq. (1982).

[10] A violation of this duty will result in strict liability in suits brought by railroad workers under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. §§ 51 et seq. (1982); *see Urie v. Thompson*, 337 U.S. 163, 188-91 (1949). The Act also provides for penalties of up to $2,500 for each violation. 45 U.S.C. § 34 (1982).

[11] See Note 6, *supra.*

road Company (BN) regarding a 1974 North Dakota grade crossing accident, has found that a violation of the Boiler Inspection Act, 45 U.S.C. § 23 (1982), and a consequent finding of negligence under state tort law, may be predicated on the removal from a locomotive for repair of an optional safety device (an amber rotating beacon) which the railroad was not required to install under the Act in the first instance.[12] The court reasoned that the amber rotating beacon, once affixed, had become a locomotive "appurtenance" which BN was required under the general provisions of the Act to maintain "in proper condition and safe to operate" while the locomotive is in use. This decision, which wholly misconstrues the requirements of the Boiler Inspection Act and undercuts the role of federal regulation of locomotive safety equipment, will have serious adverse effect on railroad safety efforts with respect to the use of optional locomotive safety equipment.

This Court, in construing the requirements of the Boiler Inspection Act, has been specially careful to avoid results which would discourage voluntary safety efforts beyond those required by the Act. The Court has thus specifically rejected the view that a "carrier creates its own standard of safety [under the Act] by the appliances which it places on its own locomotive . . .'," and has stressed that Congress did not intend that every experimental safety device voluntarily placed upon a locomotive by a carrier be considered an "appurtenance" within the strict liability provisions of the Act. *Southern Ry. Co.* v. *Lunsford*, 297 U.S. 399, 402 (1936). To so hold, this Court instructed, "would hinder commendable efforts to better conditions and tend to defeat the evident purpose—avoidance of unnecessary peril to life or limb." *Id.* at 402. As held by this Court in *Lunsford*:

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[12] At the time of the accident the BN locomotive at issue was equipped with a twin-beam headlight and a whistle, and accordingly fully complied with all relevant FRA regulations pertaining to required warning devices. See 49 C.F.R. § 230.231(a) (1974); 49 C.F.R. § 230.234 (1974).

> Whatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission, are within the statute. But mere experimental devices which do not increase the peril, but may prove helpful in an emergency, are not . . . .

Id.

The finding of the court below—that the optional amber rotating beacon removed by BN from its locomotive prior to the accident should be treated as an "appurtenance" under the Act—is inconsistent with the principles enunciated by this Court in *Lunsford* in at least two essential respects.[13]

First, the court below has essentially predicated liability under the Boiler Inspection Act upon the *absence* from a locomotive of an optional safety device that had been previous installed. The BN locomotive at issue was not found to be deficient in its equipment in any respect other than the absence of the optional amber rotating beacon and was thus otherwise as "in proper condition and safe to operate" under the Boiler Inspection Act as those locomotives in BN's fleet (and the fleets of other major railroads) that had never been originally equipped with the optional device.[14] For the court below to have premised BN's liability under the Boiler Inspection Act

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[13] In addition, the court below did not specifically consider, but apparently implicitly rejected, the view that the amber rotating light would otherwise qualify as an experimental device under *Lunsford*. The evidence of record, however, was clearly sufficient to support the conclusion that the beacon was an experimental device within the meaning of *Lunsford*. See Appendix to Petition for Certiorari, at 35a-39a.

[14] Of BN's Fleet of 2,500 locomotives in 1974, in excess of 400 were not equipped with the amber rotating beacon or other optional alterting lights. Moreover, at the time of the accident five major railroads in the United States operated in full compliance with the Boiler Inspection Act without optional alerting lights. Indeed, many locomotives in current service are operating without optional alerting lights in full compliance with the Act.

for the *absence* of a non-required safety device solely upon BN's previous voluntary installation of the equipment elevates the motion that a carrier "creates its own standard of safety under the Act"—a concept rejected in *Lunsford*—to the most illogical extreme. The optional device had a status even *less* than the "experimental" device in *Lunsford;* it was not even upon the locomotive.

Second, the decision below wholly ignores the concern expressed by this Court in *Lunsford* that the purpose of the Boiler Inspection Act ("avoidance of unnecessary peril to life or limb") not be undercut by interpretations of the Act that would unnecessarily discourage voluntary safety efforts. Indeed, it is difficult to imagine a misconstruction and misapplication of the Act more unnecessarily disruptive of voluntary safety efforts with respect to use of optional equipment than the decision below.

The railroad industry, through the voluntary initiative of individual member railroads, has long experimented with the use of different types of optional safety devices on locomotives and railroad cars in an effort to improve railroad safety and generate data from which the efficacy and cost-effectiveness of particular safety equipment may be determined. The benefits of these voluntary safety efforts directly flow to the public, both through increased railroad expenditure on optional safety equipment that may ultimately prove effective in reducing accidents and through the generation of operational data which may be used by the industry and the FRA as a basis for effecting changes in mandatory industry safety equipment standards.

These optional safety devices, like the emergency air brake mechanism ("Wright's Little Watchman") discussed by this Court in *Lunsford* and the amber rotating beacon at issue in the instant case, are generally of a character, as described in *Lunsford*, as would "not increase the peril, but may prove helpful in an emergency." *Id.* at 402.

Currently, for example, several members of the railroad industry are experimenting with use of one or more of the following locomotive safety devices not required by FRA regulations in an effort to reduce the number and severity of grade crossing accidents:[15] strobe, oscillating or beacon lights; engineer alerter systems; event recorders; reflectorized tape or other reflective material; snowplow fixtures; special brake holding mechanisms; additional horns or other audible warning devices exceeding FRA standards; minicomputer devices; brake system air flow gauges; train overspeed controls; engine cut-off mechanisms; various foot pedal safety control devices; and cab mirrors.[16]

These voluntary industry efforts with respect to the use of optional equipment, however, often do not prove productive. A particular category or type of safety device (like the "Little Watchman" in *Lunsford*) may prove ineffective or undependable in long-term service or too prone to breakage or malfunction to warrant continued use. For other devices evidence of effectiveness may be insufficient or too inconclusive to warrant expenditures that may be more fruitfully employed in more promising voluntary safety measures.

These prospects are well illustrated by the instant case. The testimony established that the rotating beacon that BN had removed from its locomotive for repair was a new model which had experienced numerous failures because of circuitry that could not withstand the stress of

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[15] Railroad grade crossing accidents are a serious industry problem of national concern. According to FRA statistics, 2,826 people were injured, and 639 killed, in grade crossing accidents in 1984. Office of Safety, Federal Railroad Administration, U.S. Dept. of Transportation, *Accident/Incident Bulletin No. 153*, Calendar Year 1984, at 23-24 (June 1985).

[16] Numerous other optional devices, such as bumper pads, have been installed in an effort to improve the safety of railroad employees.

use, and that BN subsequently used a different model on many of its trains.[17] Indeed, with regard to the effectiveness of alerting lights *in general*, the FRA specifically commenced a rulemaking proceeding in 1978 to consider whether to require the railroad industry to install a rotating beacon of the kind used in the instant case or other type of alerting light. After considering extensive data on the issue, the FRA terminated the proceedings in 1983 after finding that the evidence did not support the proposition that additional alerting lights were effective in reducing the incidence of grade crossing accidents. 48 Fed. Reg. 20257 (1983).

Industry survey with regard to other optional safety equipment currently in use further confirms widespread problems experienced by individual railroads which may result in removal or replacement of particular types of opitonal equipment. Reflectorized tape has a tendency to peel and, like other reflectorized material, is difficult and expensive to maintain in clean condition under general conditions of use. Accordingly, some railroads which have previously installed such optional reflectorized devices have removed or are in the process of removing or replacing them with other materials. Certain types or models of alerting lights have been found to be undependable from a mechanical standpoint. These too are in the process of being removed or replaced with other types of alerting lights by individual railroads. (Based upon the FRA report casting doubt upon the effectiveness of alerting lights, at least one major railroad has determined to remove, rather than replace, existing alerting lights when in need of repair.) Problems with other devices have also been experienced, and all of the devices are currently either under study by individual members of the railroad industry as to their effectiveness and maintenance characteristics, or have been studied and removed by individual railroads for various reasons after initial installation.

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[17] Appendix to Pet. at 35a-39a.

If the decision of the court below is left undisturbed, and a railroad held subject to penalty for violation of the Boiler Inspection Act (and to consequent liability under state tort law) for the absence from a locomotive of an optional safety device once previously installed, there will be a profound and wholly unnecessary disincentive placed upon the railroad industry with regard to the use of optional safety equipment. A railroad will be compelled to take into account in considering the initial use of optional equipment not only whether a particular optional device appears promising, but also whether, and to what extent, the railroad will be free to remove or replace the device without further financial penalty should initial expectations not be fulfilled. Indeed, many of the optional safety devices currently being installed involve large expenditures of funds,[18] and a railroad may be wholly unwilling to initially commit such resources if it could not be assured of the opportunity to discontinue or reduce expenditures by discontinuing use of the device should operating results and financial conditions prudently indicate. Moreover, as a further consequence of the decision below, each railroad will also be compelled to take into account the possibility that it may be forced to remove from fleet service numerous locomotives, otherwise in full compliance with the Boiler Inspection Act, for the length of time it may take to repair or replace a malfunctioning optional device (which device otherwise could generally be simply and safely removed from the locomotive for repair or replacement as in the instant case).

The consequences of the decision below, which can only have the effect of discouraging voluntary use of optional

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[18] At least one railroad is currently in the process of installing (over a three-year period) engineer alerter devices on its fleet (approximately 2400 locomotives). The alerter devices cost approximately $2,480 per locomotive to purchase and install. Event recorders (which cost approximately $5,000 each to purchase and install) have also been installed by at least one railroad upon a substantial part (1000 locomotives) of its fleet.

safety devices by the railroad industry contrary to the purpose of the Boiler Inspection Act, should not be left unchecked. This Court should make clear, pursuant to the principles established in *Lunsford*, that a railroad may remove from a locomotive any optional safety device not required by FRA regulations without fear of being subject to violation of the Boiler Inspection Act (and consequent state tort liability) for the removal of such equipment. As recognized by this Court in *Lunsford*, it is Congress' intention under the Act that the FRA, and not individual voluntary actions of railroads, determine mandatory essential equipment obligations under the Act.

II. THE DECISION BELOW CONFLICTS WITH THOSE OF OTHER CIRCUITS

The decision of the court below, which subjects a railroad to liability under the Boiler Inspection Act and state tort law based upon the absence from a locomotive of an optional safety device not required by FRA regulations, is not only unprecedented, but also in conflict with the decisions in other circuits.

The decision is directly contrary to a decision in the Third Circuit, *Grothusen v. National R.R. Passenger Corp.*, 603 F.Supp. 486 (E.D. Pa.), *aff'd mem.* 751 F.2d 376 (3d Cir. 1984), dealing with a comparable issue pertaining to federal safety regulation. In *Grothusen*, a railroad employee brought an action under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., alleging that the railroad had violated the Safety Appliance Act (SAA),[19] a railroad safety statute applicable to railroad equipment comparable to the Boiler Inspection Act, by the

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[19] 45 U.S.C. §§ 1 et seq. The SAA was originally enacted in 1893 and, similar to the Boiler Inspection Act, extensively regulates the installation and use of safety equipment on railroad cars. Violation of the SAA, similar to violation of the Boiler Inspection Act, results in strict liability in a FELA case. See *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164, 166 (1969).

removal from a railroad car of a curved handrail which the railroad had voluntarily installed in excess of FRA handrail requirements. The plaintiff employee argued that even though the curved handrail was not required by FRA regulations, the railroad was nevertheless liable under the SAA for removal of the optional safety equipment. The district court, in a decision affirmed by the court of appeals, squarely rejected the plaintiff's argument on the grounds that the construction sought would discourage voluntary safety efforts under the SAA:

> By placing these rails upon the car Amtrak took action that is beyond what is required by the SAA. To impose liability upon defendant when one of these existing measures is later removed would in practical effect deter railroads from ever taking safety actions beyond the minimum requirement of the SAA, thereby creating a greater risk for the employees. Such a result would be anomalous in light of the purpose behind this Act, which is to promote the safety of railroad employees. . . .

Id. at 489.

Although *Grothusen* specifically involved the construction of a federal safety statute other than the Boiler Inspection Act, the reasoning and result of that decision are directly applicable to Boiler Inspection Act cases,[20] and the two decisions will undoubtedly create conflicting standards for federal (and state) courts regarding pending and future Boiler Inspection Act cases. Intervention of this Court is therefore necessary to interdict the conflicting guidance and unnecessary litigation that will result from the decision below.

The decision below is also in essential conflict with a Ninth Circuit decision, *Marshall v. Burlington Northern*,

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[20] *See Urie v. Thompson*, 337 U.S. 163, 188-90 (1949); *Southern Railway v. Bryan*, 375 F.2d 155, 158 (5th Cir.) (Boiler Inspection Act and Safety Appliance Act must be construed in *pari materia*), *cert. denied*, 389 U.S. 827 (1967).

Inc., 720 F.2d 1149 (1983), construing the preemptive effect of mandatory federal equipment regulations under the Boiler Inspection Act. In *Marshall*, the plaintiff contended that a railroad could be held liable under state negligence law for the absence of an optional safety device (an alerting light) not required by FRA regulations. The Ninth Circuit, in rejecting this contention based upon the preemptive effect of federal regulations, held that a railroad which has fully complied with FRA essential equipment regulations has "complied as a matter of law" with its duty under the Boiler Inspection Act to provide essential safety equipment and cannot be held liable in negligence for the absence of additional equipment. *Id.* at 1153.

In direct contrast to *Marshall*, the court below has found that a railroad may be found in *violation* of the Boiler Inspection Act and subject to negligence liability under state law for the absence of a non-required safety device. The two decisions are, in essential respects, irreconcilable, and the conflicting holdings will lead to further confusion in federal standards in the absence of intervention by this Court.

Moreover, the nature of the conflict is of serious concern. Because the decision below would permit a railroad's essential equipment obligations to be predicated upon the potentially conflicting judgment of federal and state negligence juries rather than upon the certainty of uniform federal regulation as contemplated by Congress,[21]

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[21] In enacting in 1970 the Federal Railroad Safety Act, Congress specifically reaffirmed the preemptive effect of the Boiler Inspection Act. H.R. Rep. No. 1194, 91st Cong. 2d Sess 8, 10-11, 16, *reprinted in* 1970 U.S. Code Cong. and Ad. News at 4105, 4108, 4113-14. The 1970 legislation also specifically set forth federal policy with respect to other areas of safety regulation that "laws, rules, regulations, orders, and standards relating to railroad safety be nationally uniform to the extent practicable." 45 U.S.C. § 434 (1982). Such uniformity is essential because the railroad industry

the decision below has the potential to undercut the preemptive effect of federal regulations—on which the industry has relied [22]—and cause serious disruption to federal administration of the Boiler Inspection Act. The decision of the Court below therefore warrants immediate correction by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari. Alternatively, the Court should summarily reverse the decision below on the authority of *Southern Railway v. Lunsford*, 297 U.S. 398 (1936) and *Napier v. Atlantic Coast Line Railroad*, 272 U.S. 605, 612-13 (1926).

Respectfully submitted,

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August 30, 1985

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is interstate in character and a particular railroad passes through many different state and local jurisdictions in the ordinary course of business.

[22] AAR has consistently participated in FRA rulemaking proceedings on behalf of the industry on the premise that these regulations would provide clear, uniform standards with respect to required equipment.

APPENDICES

APPENDIX A

MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS

FULL MEMBER ROADS (U.S. LINES)

Akron, Canton & Youngstown Railroad Company

Alton & Southern Railroad Company

Atchison, Topeka & Santa Fe Railroad Company

Baltimore & Ohio Railroad Company

Curtis Bay Railroad Company

Staten Island Railroad Corporation

Baltimore & Ohio Chicago Terminal Railroad Company

Bangor & Aroostook Railroad Company

Van Buren Bridge Railroad

Belt Railway Company of Chicago

Bessemer & Lake Erie Railroad Company

Birmingham Southern Railroad Company

Burlington Northern Railroad Company

[Canadian Pacific Limited—lines operated in U.S.]

Canadian Pacific lines in Maine

Canadian Pacific lines in Vermont

Chesapeake & Ohio Railway Company

Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company

Chicago & Illinois Midland Railway Company

Chicago & North Western Transportation Company

Chicago & Western Indiana Railroad Company

Chicago, Milwaukee, St. Paul & Pacific Railroad Company

Colorado & Southern Railway

Consolidated Rail Corporation

Denver & Rio Grande Western Railroad Company

Detroit & Mackinac Railway Company

Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Forth Worth & Denver Railway

Galveston, Houston & Henderson Railroad Company

[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:

- Grand Trunk Western Railroad Company
  - Detroit, Toledo & Ironton Railroad Company
- Central Vermont Railway, Inc.
- Duluth, Winnipeg & Pacific Railway Company
- [Canadian National Railways]:
  - Lines in Michigan
  - Lines in New England
  - Lines in New York
  - Lines in Vermont

Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad Company

- Chicago & Illinois Western Railroad Company
- Waterloo Railroad

Kansas City Southern Railway Company

- Arkansas & Western Railway Company
- Fort Smith & Van Buren Railway Company
- Kansas & Missouri Railway & Terminal Railroad

Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company

Lake Terminal Railroad Company

Louisiana & Arkansas Railway Company
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Maine Central Railroad Company
    Portland Terminal Company
Manufacturers Railway Company
Metro North Commuter Railroad Company
Missouri-Kansas-Texas Railroad Company including
    Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
    Brownsville & Matamoros Bridge Terminal Company
    Chicago Heights Terminal Transfer Company
    Doniphan, Kensett & Searcy Railway Company
    Weatherford, Mineral Wells and
        Northwestern Railway Company
National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk & Western Railway Company
    Chesapeake Western Railway Company
    Lake Erie & Fort Wayne Railroad Company
    Lorain & Western Virginia Railway Company
    New Jersey, Indiana & Illinois Railroad Company
    Norfolk, Franklin & Danville Railway Company
Peoria & Pekin Union Railroad Company
Pittsburgh & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
    Montour Railroad Company
    Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
Seaboard System Railroad, Inc.
Gainesville Midland Railroad Company
Soo Line Railroad Company
Sault Ste. Bridge Company
Southern Pacific Transportation Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Petaluma & Santa Rosa Railroad Company
Visalia Electric Railroad Company
Southern Railway System
Alabama Great Southern Railroad Company
Algers, Winslow & Western Railway Company
Atlantic & East Carolina Railway Company
Camp Lejeune Railway Company
Carolina and Northwestern Railway Company
Central of Georgia Railroad Company
Cincinnati, New Orleans &
Texas Pacific Railway Company
Georgia Northern Railway Company
Georgia Southern & Florida Railway Company
Interstate Railroad Company
Live Oak, Perry & South Georgia Railway Company
Louisiana Southern Railway Company
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company
Texas Mexican Railway Company

Union Pacific Railroad Company

Spokane International Railroad Company

Mt. Hood Railway Company

Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company

Western Pacific Railroad Company

Sacramento Northern Railway Company

Tidewater Southern Railway Company

Western Railway of Alabama

Atlanta & West Point Rail Road Company

Winston-Salem Southland Railway

High Point, Thomasville & Dentor Railroad

SPECIAL CANADIAN AND MEXICAN MEMBER ROADS

CANADIAN LINES (in Canada)

Algoma Central Railway

British Columbia Hydro & Power Authority

British Columbia Railway

Canadian National Railways

Canadian Pacific Limited

Ontario Northland Railway

Toronto, Hamilton & Buffalo Railway

White Pass & Yukon Corp. Ltd.

MEXICAN LINES (in Mexico)

Chihuahua Pacific Railway Company

[Direction General de Ferrocarriles en Operacion]:

Ferrocarril Sonora-Baja California, S.A. de C.V.

Ferrocarriles Unidos del Sureste, S.A. de C.V.

Ferrocarril del Pacifico, S.A. de C.V.

National Railways of Mexico

ASSOCIATE MEMBERS

Alaska Railroad

Aliquippa & Southern Railroad Company

American Refrigerator Transit Company

Apalachicola Northern Railroad Company

Belfast & Moosehead Lake Railroad Company

Boston & Maine Corporation

Springfield Terminal Railway

California Western Railroad

Centromen Puru Incorporated

Chestnut Ridge Railway

Chicago Short Line Railway Company

Chicago South Shore & South Bend Railroad

Chicago, West Pullman & Southern Railroad Company

Chilean State Railways (CHILE)

Cities Service Company Railroad

Cliffs Western Australian Mining Co. Pty Ltd. (AUSTRALIA)

Colorado & Wyoming Railway Company

Cuyahoga Valley Railway Company

Dardenelle & Russellville Railroad Company

Delaware & Hudson Railway Company

Greenwich & Johnsville Railway Company

Delray Connecting Railway Company

Devco Railway (Cape Breton Dev. Corp.—Coal Div.) (CANADA)

Duluth & Northwestern Railroad Company

East Erie Commercial Railroad

East Jersey Railroad & Terminal Company

East St. Louis Junction Railroad Company

Empresa Minera Del Centro Del Perú Railways (PERU)
Essex Terminal Railway (CANADA)
Fepasa-Ferrovia Paulista (BRAZIL)
Fruit Growers Express Company
Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company
Hamersley Iron Pty Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.
India, Gov't. of: Ministry of Railways (INDIA)
Japanese National Railways (JAPAN)
Korean National Railroad (KOREA)
LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company
Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation
Pacific Fruit Express Company
Pearl River Valley Railroad Company

Pickens Railroad-National Railway Utilization Corp.

Port Authority of New York & New Jersey (The)

Providence & Worcester Company

Public Transport Commission of New South Wales (AUSTRALIA)

Rede Ferroviaria Federal S.A. (BRAZIL)

River Terminal Railway Company

Roberval & Saguenay Railway Company (CANADA)

Roscoe, Snyder & Pacific Railway Company

San Diego & Arizona Eastern Transportation Company

Sierra Railroad Company

Somerset Railroad Corporation

South African Railways (REPUBLIC OF SOUTH AFRICA)

Southern Indiana Railways, Inc.

Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)

Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabush Lake Railway Ltd. (CANADA)

Warwick Railway Company

Washington Terminal Company

Yancey Railroad Company

APPENDIX B

STATUTES

Section 2 of the Boiler Inspection Act, as amended, 45 U.S.C. § 23 (1982), provides:

> It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 22 to 29 and 31 to 34 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

Section 202(a) of the Federal Railroad Safety Act of 1970, as amended, 45 U.S.C. § 431(a) (1982), provides:

> The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary, research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act [45 U.S.C. 151 et seq.], including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders,

or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be construed to give the Secretary authority to issue rules, regulations, orders, and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

Section 205 of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (1982), provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

REGULATIONS

49 C.F.R. § 230.231(a) (1974), which was in effect at the time of the accident, provided:

> *Road locomotives.* Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark, object as large as a man of a average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.

49 C.F.R. § 230.234 (1974), which was in effect at the time of the accident, provided:

> Each locomotive shall be provided with a suitable whistle, or its equivalent, so arranged that it may be conveniently operated by the engineer or motorman from his position in the cab.